STATE OF SOUTH CAROLINA	**)**	**BEFORE THE CHIEF PROCUREMENT**
COUNTY OF RICHLAND	**)**	**OFFICER FOR CONSTRUCTION**
	)	
	)	
IN THE MATTER OF: CANCELLATION	**)**	
OF AWARD	**)**	**DECISION**
HORRY (US 17) WELCOME CENTER	**)**	
CONSTRUCTION	**)**	**POSTING DATE: March 10, 2003**
STATE PROJECT U12-9655-MJ	**)**	
HANCO, INC.	**)**	
Vs	**)**	
SOUTH CAROLINA DEPARTMENT	**)**	
OF TRANSPORTATION	**)**	
	)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Hanco, Inc. (Hanco) under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the Horry (US 17) Welcome Center Construction Project (the Project) for South Carolina Department of Transportation (DOT). Pursuant to §11-35-4230(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and attempted mediation, which ultimately proved unsuccessful. A hearing was held on February 28, 2003 on the issues in contention. At the conclusion of the hearing, the record was held open to permit Hanco to submit information substantiating its claim in more detail. This information was submitted on March 4, 2003. The hearing record was closed on March 5, 2003.

BASIS FOR THE CONTROVERSY

DOT received bids for the project on December 19, 2001 and posted a Notice of Intent to Award to Hanco on January 11, 2002. [Exh. 1] On January 27, 2002 the protest period for the award expired and DOT proceeded to execute the contract with an effective date of February 1, 2002. [Exh. 2, Tab 7] DOT issued a Notice to Proceed (NTP) to Hanco on March 2, 2002, which notice established a Date of Commencement of March 11, 2002. Accordingly, under the terms of the NTP, Hanco was required to commence physical work on the Project no later than March 26, 2002. On March 5, 2002 DOT verbally instructed Hanco to stop "any and all activity with regards to the project and to not incur any additional costs." [Exh. 1] On March 25, 2002 DOT issued Hanco a letter suspending the contract pending cancellation. [Exh. 1] The contractor did not mobilize his forces and no physical work was performed. On March 27, 2002 DOT submitted a request to the CPOC to cancel the award, citing changed circumstances and stating that the services procured were no longer required. [Exh. 1] On April 5, 2002 the

CPOC, acting under the authority granted by SC Code Regulation 19-445.2085(C), issued a Written Determination canceling, prior to performance and in its entirety, the award of the construction contract to Hanco, Inc. While such determinations are subject to appeal pursuant to Section 11-35-4410(1)(b), Hanco did not appeal from the Written Determination.

On April 10, 2002 Hanco notified DOT that Hanco was terminating the contract because the work had been suspended for 30 days through no fault of Hanco. Hanco subsequently petitioned the CPOC for resolution, requesting, among other relief, an award of all profits Hanco would have earned on the project.

DISCUSSION

CLAIMANT'S POSITION

Hanco contends that the form of the agreement does not contemplate termination for convenience by the Owner, citing as evidence the 2001 versions of these documents, which do contain specific reference to termination for convenience. Thus Hanco argues that the DOT's cancellation of the contract was a contract breach, entitling Hanco to recover actual damages in the amount of $6,394.94 and lost profit and overhead in the amount of $152,558.93.

RESPONDENT'S POSITION

DOT argues that its actions were entirely within the bounds of the contract and the Code and no breach occurred.

CPOC FINDINGS

It is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract. Further, this rule applies in the area of government contracts.[1] By operation of law, the Procurement Code and Regulations form a part of any contract awarded pursuant to the Code.[2]

Regulation 19-445.2085(c) expressly provides a process for the termination of a contract prior to performance. Subparagraph (C) of Regulation 19-445.2085 reads as follows:

> *C. Cancellation of Award Prior To Performance. When it is determined after an award has been issued but before performance has begun that the State's*

[1] See *City of North Charleston v. North Charleston District,* 289 S.C. 438, 346 S.E..2d 712.] (S.C. 1986).
[2] See *Unisys Corp. v. South Carolina Budget and Control Board*, 551 S.E.2d 263, 271 (S.C. 2001) ("We now hold contracts formed pursuant to the Procurement Code are deemed to incorporate the applicable statutory provisions and such provisions shall prevail.")

requirements for the goods or services have changed or have not been met, the award or contract may be canceled and either reawarded or a new solicitation issued, if the Chief Procurement Officer determines in writing that:

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services being procured are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;

(5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;

(6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

(7) Administrative error of the procuring agency discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

As a procurement regulation, this regulation forms a part of the contract. A contract is not breached if it is terminated in accordance with the terms of the contract.[3] In accordance with this regulation, the contract was terminated by written determination. As the contract was terminated pursuant to its terms, the termination did not constitute a breach of contract and no damages are available for the termination. Accordingly, Hanco's request is denied.

For several reasons, Hanco's position is inconsistent with a plain reading of the regulation. First, Hanco argues that a termination under the regulation is a breach of contract, unless the signed contract documents contain a "termination for convenience" clause. Nothing in the regulation even suggests that the exercise of the regulation is tied to such a clause. To the contrary, the regulation expressly contemplates that the contract awarded by the state (not a different contract) may be taken from one contractor and re-awarded to a different contractor, much as the Panel does when it sustains a protest and re-awards a contract to the protestant. To conclude that the price of exercising this authority comes at the price of compensating the first contractor with its expected profits would effectively foreclose the use of this regulation.

[3] Cf. *Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership*, 574 S.E.2d 726 (S.C. 2002). See also 17B C.J.S., *Contracts* § 448 (1999) ([T]he exercise of a reserved power of termination will . . . discharge both parties from their contractual duty to perform promises that are still wholly executory…"), 13 Corbin on Contracts § 1266 (Interim Edition 2002) ("The exercise of a reserved power of termination will usually have prospective operation only; it will discharge both parties from their contractual duty to perform promises that are still wholly executory…") (cited by *Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership*, 574 S.E.2d 726 (S.C. 2002)), and *Krim Cartage Co. v. Courier Services, Inc.*, 52 A.D.2d 831 (N.Y. App. Div. 1976) (ruling that an action cannot be maintained for inducing a breach of contract when the contract was terminated pursuant to its terms).

Second, Hanco's argument is also undermined by the existence of an administrative process by which a contractor can appeal such a termination directly to this Panel. The very reason for such a process to exist is that the impact on a contractor is so harsh. If the contractor could simply collect its putative profits without doing any work, there would be no reason to provide the contractor with an opportunity to challenge the termination. The requisite approval of the CPOC was properly requested by DOT and issued with proper notice to the parties. There was no appeal by Hanco, and the State deserves finality on its actions.

Third, Hanco's argument is further undermined by the limitations the regulation places on the CPOC's authority to terminate under the contract. According to the regulation, the CPOC can only terminate "prior to performance." In other words, the CPOC can only terminate under the regulation before the contractor begins to perform under the contract, precisely when the contractor would begin to incur actual losses (other than expected profits). This limitation is needed precisely because no damages are available for a pre-performance termination made in accordance with regulation 19-445.2085(c).

Lastly, many years of administrative practice, as well as prior Panel opinions, illustrate that the agency has consistently applied regulation 19-445.2085(c) in a manner that does not provide breach of contract damages. Several Panel opinions suggest the same.[4] The CPO finds no reason to change this long standing practice. The Hanco claim is hereby denied in full.

IT IS SO ORDERED

Michael M. Thomas
Chief Procurement Officer for Construction

March 10, 2003
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

> *A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the*

[4] Protest of Blue Cross Blue Shield of South Carolina, Case No. 1996-3, Protest of Analytical Automation Specialists, Inc., Case No. 1999-1, and Protest of B&D Marine, Case No. 2000-12.

Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). …Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

Additional information regarding the administrative review process is available on the internet at the following Web site: http://www.state.sc.us/mmo/legal/lawmenu.htm